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IN THE

Supreme Court of the United States

October Term 1993

PHYLLIS MILLER,

Petitioner,

v.

DINO LA ROSA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION FOR WOMEN, AMERICAN ASSOCIATION OF RETIRED PERSONS, NOW LEGAL DEFENSE & EDUCATION FUND, FEDERALLY EMPLOYED WOMEN, FEMINIST MAJORITY FOUNDATION, JAPANESE AMERICAN CITIZENS LEAGUE, NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, AND YWCA OF THE USA IN SUPPORT OF PETITION FOR CERTIORARI

KIM A. GANDY
National Organization for Women
1000 16th Street, N.W.
Washington, D.C. 20036

CATHY VENTRELL-MONSEES
MICHELE POLLAK
American Association of Retired Persons
601 E Street, N.W.
Washington, D.C. 20049

J. ANDREW HEATON*
DAVID C. FINN
1300 I Street, N.W.
Washington, D.C. 20005
(202) 962-7000

Attorneys for Amici

November 24, 1993

* Counsel of Record

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The National Organization for Women ("NOW"), the American Association of Retired Persons ("AARP") and other *amici* herein respectfully pray that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 19, 1993.[1]

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[1] Written consents by counsel for petitioner and respondents to the filing of the brief have been filed with the Clerk's office.

INTERESTS OF THE AMICI CURIAE

NOW is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 700 chapters in all 50 states and the District of Columbia. Since its inception, NOW has supported and worked toward full equal employment opportunity for women, including the elimination of sexual harassment and other discrimination in the workplace.

The AARP is a non-profit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of the AARP's thirty-four million members are employed, most of whom are protected by Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. One of the AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices and policies regarding work and retirement. In pursuit of this objective, the AARP has participated as *amicus curiae* in numerous discrimination cases before this Court and the federal courts of appeals.

NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was formed in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, such as sexual harassment. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal pending*, and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Founded in 1987, the Feminist Majority Foundation ("FMF") is a non-profit, national organization with officers in Arlington, Virginia and Los Angeles, California. The primary goal of FMF

is the empowerment of women. FMF believes that employers as well as their agents must be held accountable for employment discrimination under Title VII and the Age Discrimination in Employment Act. The exclusion of supervisors, managers, and other agents of an employer as defendants in employment discrimination cases would severely undermine enforcement of anti-discrimination statutes and the rights of women workers.

Federally Employed Women, Inc. ("FEW") is an international non-profit organization representing over one million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. Recognizing that sexual harassment is the most blatant form of sex discrimination, FEW has vigorously pursued activities designed to educate workers on the issue, extend protection and relief to victims of harassment, and ensure that employers and employees are held responsible for illegal acts.

As the "Voice of Working Women" for 75 years, the National Federation of Business and Professional Women's Clubs, Inc. of the United States of America ("BPW/USA") has taken steps to end sexual harassment in the workplace. BPW/USA's 80,000 members in 2800 Local Organizations across the United States, including the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have sought economic equity for working women through education and advocacy.

The Japanese American Citizens League ("JACL") is the largest Asian American civil and human rights organization in the United States. Established as a non-profit organization in 1929, JACL has participated, either as a party or as *amicus curiae*, in various legal actions which have challenged racial discrimination against Asian Americans. One of JACL's primary missions is to secure equal opportunity for Asian Americans and to fight discrimination in all forms.

Celebrating its 135th year, the YWCA of the USA provides services to over 12 million women and girls and their families in 400 community and student associations operating at over 4000 locations throughout the 50 states. The mission of the YWCA is the empowerment of women and the elimination of racism. Employment discrimination therefore has been a major focus of our advocacy.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit in this case, if left standing, would undermine two key civil rights statutes: Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act ("ADEA"). At present, it is common for victims of employment discrimination to sue not only their actual employer but also those individuals — supervisors, managers, or other agents of the employer — who committed the discriminatory acts in question. Proceeding against these perpetrators makes sense: these are the very people who engaged in the wrongful conduct. Moreover, in cases where the employer is bankrupt or otherwise judgment proof, or has a legal defense to liability, proceeding against the individuals can be the victim's only chance to recover.

Astonishingly, the Ninth Circuit has now held that Title VII and the ADEA — and, by implication, the Americans with Disabilities Act ("ADA") as well[2] — afford no relief against the people who actually engage in discriminatory conduct. Under the Ninth Circuit's decision, *only* actual employers, and not the responsible individuals, may be held liable.

The Ninth Circuit's decision turns the traditional notion of personal liability for wrongful acts on its head. If a supervisor slanders an employee, steals money from the employee's wallet, or

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[2] The key definitions in the ADA are essentially identical to those in the ADEA and Title VII. *See, e.g.*, 42 U.S.C. § 12112(5)(A) (defining "employer" to include any agent of an actual employer).

knocks the employee on the head, it goes without saying that the supervisor may be held personally liable for those wrongs. The only question is whether the supervisor's employer may also be held liable. Yet, under the Ninth Circuit's decision, if that same supervisor dismisses an employee because of the employee's race, withholds money from the employee's paycheck because of the employee's age, or sexually assaults the employee, the employer may be held liable under Title VII or the ADEA, but the supervisor cannot be.

The practical effects of the Ninth Circuit's decision could be enormous. In fiscal 1993, more than 9,000 employment discrimination charges were filed with the Equal Employment Opportunity Commission ("EEOC") in the Ninth Circuit alone.[3] Each of these charges could result in litigation affected by the Ninth Circuit's holding. Moreover, the Ninth Circuit's decision could have repercussions nationwide. Prior to the decision, seven circuits had held that an agent of an employer may be named as a defendant in a Title VII or ADEA case,[4] while *no* circuit had rejected that seemingly obvious proposition. Now, the issue is in doubt.[5]

The Ninth Circuit's holding will leave victims of discrimination uncompensated and will undermine efforts to prevent discrimi-

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[3] This figure reflects the number of charges received during fiscal 1993 by the EEOC offices in California, Washington and Hawaii. *See* FY93 Charge Receipts - Distribution in Four Districts (EEOC 1993) (on file with counsel).

[4] *See* Petition for a Writ of Certiorari at 15-18; *Jones v. Wesco Invs. Inc.*, 846 F.2d 1154, 1156-57 (8th Cir. 1988); *see also Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134 (2d Cir. 1993) (affirming finding of Title VII liability against employer and agents); *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) (public employees could be named as defendants in their official capacities).

[5] In the Northern District of Illinois, for instance, judges have both followed and rejected the Ninth Circuit's holding in recent months. *Compare, e.g., Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769 (N.D. Ill. 1993) (rejecting Ninth Circuit decision) *with Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525 (N.D. Ill. 1993) (following Ninth Circuit decision)

nation in the first place. Further, the court's decision is both inconsistent with the language enacted by Congress and unsupported by the legislative history. This Court should grant *certiorari* and reverse.

I. THE NINTH CIRCUIT'S DECISION WILL UNDERMINE THE DETERRENT AND PUNITIVE EFFECT OF THE FEDERAL EMPLOYMENT DISCRIMINATION LAWS

Two years ago, Congress strengthened Title VII by enacting the Civil Rights Act of 1991 (the "1991 Act"), which provided for limited compensatory and punitive damages in Title VII cases.[6] In explaining the need for the 1991 Act, the House Education and Labor Committee quoted the testimony of Ellen Vargyas of the National Women's Law Center:

> "Who should bear the non-wage costs of intentional, illegal discrimination: the perpetrator of the discrimination or the victim?" Under current Title VII law, it is the victim.

H.R. REP. No. 40(I), 102d Cong., 1st Sess. 66 (1991). The implication was clear: the 1991 Act was needed so that perpetrators, not victims, would bear the cost of discrimination. "As Dr. Heidi Hartmann, an economist, testified before the Committee, 'if discrimination costs money, people will stop doing it.'" *Id.* at 69.

The Senate Committee on Labor and Human Resources also recognized that compensatory and punitive damages were necessary to penalize those who discriminate. In its report on an earlier version of the 1991 Act, the committee quoted remarks by then-Judge Clarence Thomas, former Chair of the EEOC:

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[6] The ADEA already provided for double damages in cases of willful violations. *See* 29 U.S.C. §§ 626(b), 216(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-26 (1985).

> While we can provide backpay and reinstatement to employees who have been wrongfully denied equal job opportunities, we cannot penalize those who discriminate. . . . [I]t is a disgrace that the penalty for tampering with a mailbox is greater than the penalty for discriminating.

Clarence Thomas, Discrimination and Its Effects, Speech Before the New Coalition (August 17, 1983), *quoted in* S. REP. No. 315, 101st Cong., 2d Sess. 32 (1990).

The Ninth Circuit's decision undermines the punitive and deterrent goals of the 1991 Act by making it impossible for people who engage in discrimination to be held legally accountable for their acts. Under the Ninth Circuit's decision, perpetrators will *not* bear the cost of discrimination. For these individuals, the penalty for tampering with a mailbox will once again be greater than the penalty for discriminating.

A. The Ninth Circuit's Decision Will Prevent Culpable Parties From Being Punished.

When Title VII was enacted, it was common for employers to have official policies condoning, or even mandating, discrimination on the basis of race, sex or other impermissible characteristics. Today, few employers have such official policies. Instead, most employment discrimination cases involve *ad hoc* acts of discrimination by particular supervisors or managers within the company. The company may properly be held accountable for such acts, but the specific people who commit the discriminatory acts are the truly culpable parties — the ones who most deserve to pay the costs of discrimination. Yet under the Ninth Circuit's decision, these perpetrators cannot be held liable under Title VII or the ADEA, no matter how outrageous their conduct.

The following cases are representative of lawsuits in which victims of intentional discrimination have asserted Title VII or ADEA claims against individual defendants — claims which would be barred under the Ninth Circuit's decision.

In *Stockett v. Tolin*, 791 F. Supp. 1536 (S.D. Fla. 1992), the district court found that the plaintiff, Michelle Stockett, had been sexually harassed by the head of her company, Frank Tolin, on numerous occasions spanning more than a year. For instance:

> On [one] occasion, . . . Tolin came up behind [Stockett], stuck his tongue in her ear and told her in the crudest terms that he wanted to perform oral sex on her. Stockett testified further that [on another occasion], the Defendant again approached her from behind, . . . stuck his tongue in her ear, and said with a four letter expletive that he wanted to have sexual intercourse with Plaintiff. On still other occasions, Stockett testified that . . . the Defendant would corner her, run his fingers up the front of her shirt, grab her breasts and pinch her nipples. During these assaults, he laughed and said, "You like that, don't you." Stockett testified that incidents such as these occurred weekly throughout [her] employment.
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> * * *
>
> One night . . . Tolin pushed her up against the wall and began licking her neck. According to Plaintiff, Tolin said he "wanted to f--- me." . . . Stockett testified that she was terrified. . . . According to [a witness who interrupted the incident], Stockett had tears in her eyes and from the look in Stockett's eyes and on her face, it was apparent that Stockett was afraid.
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> * * *
>
> [Shortly before Stockett left the job], she encountered Tolin in a hallway. Tolin . . . asked how long she had been working there. When she replied that she had worked there for about one and one-half years, Tolin said to her, "you've always got an excuse, I want to f--- you." . . . Stockett told Tolin that she worked hard at her job and asked him to leave her alone. Tolin

> responded with a torrent of sexually explicit comments that included, "Oh, you work hard. Do you f--- hard?" [He] finally demanded, "F--- me or you're fired."

Id. at 1542-43.

As the district court concluded, Tolin "blatantly and repeatedly harassed Plaintiff and many other women who worked for him. His conduct included both constant sexually explicit, degrading, and vulgar language and repeated acts of physical abuse. His offensive sexual behavior was relentless, and can only be characterized as crossing all bounds of common decency." *Id.* at 1553. The court held Tolin personally liable for this outrageous conduct. *Id.* at 1554. It awarded back and front pay against him and his business, and held them both liable for attorneys' fees. *Id.* at 1560-61.

In another sexual harassment case, *Jones v. Wesco Investments Inc.*, 846 F.2d 1154 (8th Cir. 1988), the Eighth Circuit affirmed the district court's judgment in favor of the plaintiff, Judith Jones, against her employer, Wesco, and its president, Ben Rose. As the court noted:

> From the beginning of her tenure with Wesco, Ms. Jones was barraged with repeated sexual advances, request[s] for sexual favors, and other verbal or physical contact of a sexual nature. For instance, Ben Rose would come up behind Ms. Jones and rub his hands up and down the sides of her body, touching her breasts. He would pinch her, pat her on the bottom and kiss her on the top of her head. At one point, Rose even put his hand up Ms. Jones' dress. . . . His oral comments included a statement that someday her breasts would be his. On one occasion, Ben Rose . . . informed Ms. Jones that he thought it a good idea that Ms. Jones spend more time in the kitchen area where it was cool because he could see her nipples much better in the cool temperature.

Id. at 1155.

The district court held Rose personally liable under Title VII for his acts of harassment, and the Eighth Circuit concluded that "the district court's decision is fully supported by the facts and law. Indeed, any other result would have been a miscarriage of justice." *Id.* at 1156-57.

In *Madden v. Independence Bank*, 771 F. Supp. 1506, 771 F. Supp. 1510, 771 F. Supp. 1514 (C.D. Cal. 1991), five former employees of the defendant bank brought ADEA claims against the bank and its president, Fulvio Dobrich. The plaintiffs alleged that they had been fired because Dobrich "wanted to eliminate certain workers over forty years of age who did not fit his idea of the bank's corporate image." *Id.* at 1507, 1511. In denying defendants' motion for summary judgment against four of the plaintiffs, the district court noted that there was substantial evidence that Dobrich had acted with discriminatory intent:

> For example, Dobrich referred to an over-forty employee as too old, and not fitting the image of the bank; he called a sixty-year old female employee an "old f--cking bitch": he made references to the bank as being "full of old people"; and he once taunted an over-forty year-old employee stating that there was a young lady in the bank who was dying to have her job.

Id. at 1508; *see also id.* at 1518. Dobrich claimed that the plaintiffs had been fired as part of a staff reduction needed to cut expenses. But one of the bank's own managers "stated in his deposition that he understood the job elimination scheme to be a ruse, and that the real purpose was to get rid of older employees." *Id.* at 1509; *see also id.* at 1518.

Cases such as these graphically illustrate the importance of individual liability under the civil rights laws. In such cases, the perpetrators of discrimination roundly deserve to be punished for their wrongful conduct. But under the Ninth Circuit's decision, the Title VII and ADEA claims against the individual defendants could

not have gone forward in any of these cases. Even where individual defendants are found to have committed repeated acts of intentional discrimination, as in *Jones* and *Stockett*, federal law would provide no sanction.[7]

B. The Ninth Circuit's Decision Will Undermine Title VII and ADEA Enforcement.

It seems obvious that eliminating the threat of personal liability would reduce the incentive for supervisors and other employees to comply with the employment discrimination laws. Indeed, the Fifth Circuit has concluded that eliminating individual liability "would encourage supervisory personnel to believe that they may violate Title VII with impunity." *Hamilton v. Rodgers*, 791 F.2d 439, 443 (5th Cir. 1986). But the Ninth Circuit termed this reasoning "unsound," suggesting that employees will behave themselves even if they do not face direct liability because of the threat of discipline by their employers. As the court put it:

> No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the . . . violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief.

Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1993). Thus, the Ninth Circuit concluded that individual liability is not necessary to deter Title VII and ADEA violations.

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[7] Depending on the jurisdiction and the facts of the case, some relief might be available under state law. *See, e.g., Stockett*, 791 F. Supp. at 1560-61 (awarding damages under Florida law). But even in such cases, the individual defendants could not be subject to the special remedies afforded by federal law, such as attorneys' fees.

The Ninth Circuit erred. It ascribed far more power to employers than they really have, and too little power to the threat of personal liability.

First, an employer is not always free to take effective remedial action against employees who violate employment discrimination laws. For instance, in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers*, 959 F.2d 685 (7th Cir.), *cert. denied*, 113 S. Ct. 304 (1992), the Seventh Circuit upheld an arbitrator's reinstatement of a forklift operator who had been fired for sexually assaulting a co-worker. The facts were undisputed: during a phone conversation, the operator "put down the telephone receiver and approached the co-worker from behind and grabbed her breasts . . . . He then returned to the telephone and stated, 'Yup, they're real.'" *Id.* at 686 n.1. To support its decision to fire the operator, Chrysler presented evidence that the operator had also grabbed or pinched female co-workers on four other occasions. Nevertheless, the arbitrator held that the operator had not been dismissed for good cause and directed Chrysler to reinstate him with back pay. *Id. See also Hirschfeld v. New Mexico Corrections Dep't*, 916 F.2d 572, 574 (10th Cir. 1990) (demotion of a corrections officer who had sexually harassed two women was reversed by a state personnel board); *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1989) (ordering reinstatement of employee who had been fired by Internal Revenue Service for harassing two female IRS employees).[8]

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[8] Even if the employer ultimately prevails in such cases, the mere threat of a protracted legal battle may reduce the employer's incentive to take firm action against offending employees. *See, e.g., Garziano v. E.I. du Pont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (employee fired for sexual harassment won $93,000 defamation verdict against employer; reversed on appeal); *Agugliaro v. Brooks Bros., Inc.*, 802 F. Supp. 956 (S.D.N.Y. 1992) (employee purportedly fired for sexually harassing a subordinate sued former employer, claiming that he was actually terminated because of his age and gender).

Second, the Ninth Circuit wrongly assumed that when "supervisory or other personnel" commit acts of discrimination, there will always be a superior with authority to set the employee straight. In many cases, however, the perpetrator in question is also a high-level manager of the company. *See supra* pp. 8-10 (discussing cases of egregious, intentional discrimination by top managers). Such an employee may face no realistic prospect of being disciplined by the company for his or her wrongful acts.

Third, the Ninth Circuit understates the likely deterrent effect of personal liability. To be sure, the threat of discipline by one's employer may help to deter some civil rights violations. But just as surely, the threat of such discipline *coupled with the threat of personal liability* would be an even greater deterrent. If one has to worry about losing one's job *and* paying the fine, that is twice the reason to avoid the illegal conduct. By contrast, the incentive to obey the law is diminished when someone else will be paying the fine. *Cf. Messersmith v. American Fidelity Co.*, 232 N.Y. 161, 165, 133 N.E. 432, 433 (1921) (Cardozo, J.) (noting that wrongdoer, not insurance company, must bear the cost of intentional wrongful conduct because of "the fundamental principle that no one shall be permitted to take advantage of his own wrong").

II. THE NINTH CIRCUIT'S DECISION WILL LEAVE MANY VICTIMS OF DISCRIMINATION WITHOUT A REMEDY

The Ninth Circuit's conclusion that employer liability is sufficient to deter discrimination is also wrong for another reason: in many cases, there is no employer that can be held liable. In these cases, the Ninth Circuit's holding will not only undermine the deterrence of employment discrimination, but will leave victims without a remedy as well.

A. Many Victims of Sexual Harassment Will Be Left Uncompensated.

This Court recently reaffirmed that sexual harassment which creates a hostile or abusive work environment is actionable under

Title VII. *Harris v. Forklift Systems, Inc.*, 61 U.S.L.W. 4004 (U.S. Nov. 9, 1993). Yet the Ninth Circuit's decision would leave many victims of such harassment with no Title VII remedy. Having been foreclosed by previous decisions from suing their employers for such harassment, these victims would now be precluded from suing the actual perpetrators of discrimination as well.

This Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), made clear that not all victims of sexual harassment have a remedy against their employer. In *Vinson*, this Court "decline[d] the parties' invitation to issue a definitive rule on employer liability," but expressly held that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72. Since *Vinson*, courts in numerous cases have declined to impose liability on employers for sexual harassment by co-workers — even where such acts were pervasive enough to amount to a term or condition of employment and would not have taken place but for the employment relationship. *See, e.g., Hirschfeld*, 916 F.2d at 576-80; *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990); *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1315-17 (11th Cir. 1989). Similarly, the EEOC's current policy guidance on sexual harassment suggests that if employers have a "strong policy against sexual harassment" and maintain an "effective complaint procedure," they may escape liability even in clear cases of harassment. *See* EEOC Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990), *reprinted in* BNA DAILY LABOR REPORT, Mar. 28, 1990, at E-1.

Where the employer cannot be held liable, an action against the perpetrator may be the victim's only remedy. In *Steele*, for instance, plaintiff Mary Steele sued both the perpetrator and her corporate employer for sexual harassment. The district court found that the perpetrator had "violated Title VII by creating a hostile working environment," and ordered him to pay attorney fees of $16,650. But the court also found that Steele's "corporate employer was not liable for the hostile environment because it took

prompt remedial action" after it learned about the harassment. *Id.* at 1314. The court also rejected Steele's claim under Florida law against both her employer and the perpetrator. *Id.* at 1315. Thus, Steele's *only* recovery was under Title VII against the perpetrator — a claim which would have been barred under the Ninth Circuit's decision.

B. Employees of Bankrupt or Judgment Proof Employers Will Be Left Uncompensated.

Victims of sexual harassment are not the only ones who could be left without a remedy if the Ninth Circuit's decision remains in force. Victims of any form of discrimination barred by Title VII or the ADEA would be unable to recover back pay, damages, or other monetary relief in cases where the victim's employer is bankrupt, out of business or otherwise judgment proof. As one court recently noted:

> [T]here are cases . . . in which the defendant company goes bankrupt and the plaintiff is forced to seek recovery from the supervisory employees who committed the discriminatory acts. [I]f the people who make discriminatory decisions do not have to pay for them . . . the victim may receive no compensation whatsoever.

Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 786 (N.D. Ill. 1993).

Petitioner Miller's own case is an excellent example. Because the company Miller worked for filed for bankruptcy, Miller will not be able to obtain full relief for her alleged injuries if the Ninth Circuit's decision is allowed to stand. Her only chance for a complete recovery was to sue her supervisors directly. Now, the Ninth Circuit has blocked that avenue of relief as well.

III. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE STATUTES AND IS UNSUPPORTED BY THE LEGISLATIVE HISTORY

As Petitioner Miller has explained, *see* Petition at 11-15, the Ninth Circuit's decision is inconsistent with the plain language of both Title VII and the ADEA, both of which expressly provide that the term "employer" includes any agent of the employer. Indeed, the Ninth Circuit made no serious attempt to reconcile its holding with the actual language of the statutes. It effectively ignored the statutory language in favor of its guess as to what Congress must have intended to do. *See Miller*, 991 F.2d at 587-88.

Of course, the best indication of what Congress intended to do is what it actually did. Under both statutes, "employers" are liable for violations and "employers" include not just actual employers, but agents of employers as well. Thus, a straightforward reading of each statute compels the conclusion that agents of employers may be held liable under both Title VII and the ADEA.

Moreover, certain exceptions included within Title VII's definition of "employer" appear to have been carefully drafted on the understanding that agents of an employer are subject to liability. Under Title VII as originally enacted, "employer" is defined to mean

> a person engaged in an industry affecting commerce who has twenty-five or more employees . . . *and any agent of such a person* . . . Provided, that during the first year after the effective date . . . persons having fewer than one hundred employees *(and their agents)* shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees *(and their agents)* shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees *(and their agents)* shall not be considered employers.

Pub. L. 88-352, § 701, 78 Stat. 253 (1964) (emphasis added). Likewise, when Congress amended Title VII in 1972 to lower the threshold number of employees to 15, it provided a one-year exception for both employers with fewer than 25 employees *"and their agents."* Pub. L. 92-261, § 2, 86 Stat. 103 (1972), *codified at* 42 U.S.C. § 2000e(b).

Thus, each time Congress exempted an employer from liability under Title VII on the basis of size, it expressly excluded the employer's agents as well. If the inclusion of the term "agent" in the definition of employer had been meant only to provide for *respondeat superior* liability, as the Ninth Circuit believed, *see Miller*, 991 F.2d at 587, these exclusions would not have been necessary.

Nor does the legislative history support the Ninth Circuit's interpretation. The Ninth Circuit found it "inconceivable" that Congress could have intended to exempt small employers from Title VII and the ADEA, yet leave individual employees subject to liability. *Id.* But the legislative record suggests that this is precisely what Congress had in mind: members were concerned with *small businesses*, not individual employees, largely because of the personal nature of such enterprises.

For instance, Senator Humphrey, a leading proponent of Title VII, commented on the small employer exemption during Senate debate in 1964:

> A large number of small businesses in America . . . employ fewer than 25 persons. When they get above 25 . . . [they] lose most of whatever intimate, personal character they might have had.

110 CONG. REC. 13088 (June 9, 1964) (remarks of Sen. Humphrey). Several years later, in debate over lowering the minimum number of employees from 25 to 8, critics of the measure (who succeeded in raising the new minimum to 15) also focused on the unique nature of small businesses, many of which are family-run. *See, e.g.*, SUBCOMMITTEE ON LABOR, SENATE COMMITTEE ON

LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1298 (Comm. Print 1972) (remarks of Sen. Fannin) (many minority small businesses "are in effect an extension and an intensification of the heritage of these people"); *id.* at 1010 (remarks of Sen. Cotton) (hiring of an employee by a small business is an "intensely personal act . . . almost like selecting a partner"); *id.* at 1375 (remarks of Sen. Ervin) (referring to special relationship between small business operator and employees).

Comments such as these make clear that the Title VII exemptions for small businesses were intended to address concerns peculiar to such entities — and that the Ninth Circuit erred in assuming that Congress also meant to exempt individual employees of larger entities.[9] We have found nothing in the legislative history of Title VII or the ADEA to suggest that Congress intended to exclude individual employees from the reach of either statute.

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[9] Of course, individual employees of *small* businesses are exempt from coverage under the small business exemption since they are not agents of an "employer" as defined in Title VII and the ADEA.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be granted and the decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

Of Counsel:
KIM A. GANDY
Executive Vice President
National Organization for Women
1000 16th Street, N.W.
Washington, D.C. 20036

CATHY VENTRELL-MONSEES
MICHELE POLLAK
American Association of Retired Persons
601 E Street, N.W.
Washington, D.C. 20049

TANINA ROSTAIN
Supervising Attorney
Civil Rights Clinic
University of Connecticut School of Law
65 Elizabeth Street
Hartford, CT 06105

J. ANDREW HEATON*
DAVID C. FINN
1300 I Street, N.W.
Washington, D.C. 20005
(202) 962-7214

Attorneys for Amici

* Counsel of Record